Proper litigation and integrity of the parties would have deemed that this discovery of new evidence be disclosed to the Privy Council then hearing the appeal. Failing which, the party concerned should not be heard to complain that he has lost the appeals.

In my opinion, it is an abuse of the process of the court to grant the plaintiffs' wish to have a second bite at the proverbial apple. On these grounds, the plaintiffs' writ is struck out with costs to the defendant. The plaintiffs' application for stay of the Privy Council's judgment is refused.

Application dismissed.

Solicitors: *Moses & Saga; P. Suppiah & Co.; Subra Naicker & Co.*

ROHANA BTE ARIFFIN v. UNIVERSITI SAINS MALAYSIA

HASHIM HUSSIN YAACOB v. UNIVERSITI SAINS MALAYSIA

[O.C.J. (Edgar Joseph Jr. J.) November 13 & 24, 1986]

[Penang – Originating Motions 32-17-86 and 32-19-86]

Administrative Law – Certiorari – Order for – Preliminary objection – Whether affidavit of service can be filed before motion is entered for hearing – Impossibility – When should affidavit be filed.

Civil Procedure – Certiorari – Order for – Affidavit of service – When should affidavit be filed – R.H.C. 1980, O. 53 r. 2(4).

In the two cases, the applicants, both lecturers in the respondent university, obtained leave to apply for an order of certiorari. Their applications were heard together by the present court. Both the applicants were found guilty of certain offences by the disciplinary authority of the respondent. The council of the respondent dismissed their appeals. Therefore they sought the order of certiorari to quash the decisions of the council of the respondent.

Before the substantive applications were heard, a preliminary objection, *inter alia,* was raised by the respondent. It was contended that under Order 53 rule 2(4) of the Rules of the High Court 1980, an affidavit of service is to be filed before the motion or summons is entered for hearing. Service must, in practice, be effected within 14 days after the grant of leave. It was contended that this procedure was not followed in the present case and therefore the applications were incompetent and should therefore be dismissed *in limine.*

Held, *inter alia:* (1) on the construction of the Rules, it is impossible to file an affidavit of service before the motion is entered for hearing;

(2) since the affidavit of service is only required when the substantive applications are heard, it is sufficient compliance with the Rules if the affidavit is filed before such date;

(3) on the facts of the present case, the respondent had ample notice even before leave was granted that the applicants intended to apply for orders of certiorari and no question of prejudice could arise nor for that matter could any have been alleged having regard to the circumstances;

(4) alternatively, even if there has been a breach of Order 53 rule 2(4), the court should condone the breach since the respondent suffered no prejudice;

(5) the preliminary objection should be dismissed.

Cases referred to:

(1) *Jasabena Sdn. Bhd.* v. *Beh Heng Poo* [1985] 1 M.L.J. 394.
(2) *Rex* v. *Leicestershire Justice* [1850] 15 Q.B. 88; 117 E.R. 391.
(3) *Mayer* v. *Harding* [1867] L.R. 2 Q.B. 410.
(4) *Harding* v. *Price* [1948] 1 K.B. 695.
(5) *Metroinvest Ansalt* v. *Commercial Union* [1985] 1 W.L.R. 513, 521.
(6) *Gan Hay Chang* v. *Sow Kian Yuh* [1975] 2 M.L.J. 129, 131.
(7) *Secretary of State for Defence* v. *Warn* [1970] A.C. 394, 402.
(8) *Mersing Omnibus* v. *Minister of Labour* [1983] 2 M.L.J. 54.
(9) *Soho Square Syndicate Ltd.* v. *E. Pollard & Co. Ltd.* [1940] Ch. 638.
(10) *Bowmaker Ltd.* v. *Tabor* [1941] 2 K.B. 1.

ORIGINATING MOTION.

Haji Sulaiman bin Abdullah for the applicants.

N.G. Sivanander for the respondent.

Cur. Adv. Vult.

Edgar Joseph Jr. J.: In these two consolidated applications by Rohana bte Ariffin and Hashim Hussin Yaacob, both lecturers in Sociology and Development Studies at the Universiti Sains, Malaysia, the respondent herein, made pursuant to leave granted by Harun J. on May 21, 1986 for orders of certiorari to remove into this court, for the purpose of they being quashed, two separate decisions dated March 10, 1986 of the council of the respondent University dismissing their appeals from decisions of the disciplinary authority of the respondent University whereby, in the case of Rohana, she was found guilty of a single count and, in the case of Hashim, he was found guilty of four out of six counts, in contravention of certain rules of the Universiti Sains (Discipline of Staff) Rules 1979, on grounds of bias, denial of natural justice and

error of law apparent on the face of the record, a preliminary objection by counsel for the respondent was raised before me.

It was argued that although the applicants had obtained the necessary leave for the commencement of these proceedings and had entered them by filing within the periods limited by Order 53 rules 1A, 2(1) and 2(2), respectively, they had defaulted in respect of two other requirements. It was said that because Order 53 rule 2(4) requires an affidavit of service to be filed before the motion or summons is entered for hearing, service must, in practice, be effected within 14 days after the grant of leave and since, in both cases, leave was granted on May 21, 1986, such service effected only on October 29, 1986, and the affidavit of service filed only on November 3, 1986, the applications were incompetent and should therefore be dismissed *in limine*.

Before I embark upon a consideration of the preliminary objection, it may be pertinent to mention certain facts by way of background.

At the time when the applications for leave to commence certiorari proceedings were heard, there were also heard immediately before this applications by the respondent for transfer of "all proceedings" from the High Court in Kuala Lumpur to the High Court in Penang. In the result, after hearing counsel for both parties and Federal Counsel who appeared on behalf of the Attorney General who, although served, was not a party, Harun J. granted leave to commence certiorari proceedings, made an order amending the originating summons therein by converting them into originating motions and, lastly, ordered the transfer of the proceedings to the High Court, Penang.

Clearly, therefore, the respondent had, in fact, ample notice even before leave was granted that the applicants intended to apply for orders of certiorari and no question of prejudice could arise nor for that matter could any have been alleged having regard to the circumstances.

I must now revert to the preliminary objection.

In considering the dry question of law posed by the preliminary objection, I found it necessary to analyse the procedure governing applications for certiorari.

It is manifestly clear from the provisions of Order 53 that the applicant for certiorari must clear two hurdles. In the first stage he must seek, by an *ex parte* application filed not later than six weeks from the date of the impugned judgment, order, conviction or other proceeding, the leave of the court to apply for the order of certiorari and then, if leave is granted, the second stage is the substantive application for the order itself: Order 53 rule 2(1). The applicant or his solicitor must next enter a motion or summons as the case may be within 14 days of the grant of leave: Order 53 rule 2(2). This is done by filing sufficient copies of the motion or summons in the Registry of the High Court within the required period: see *Jasabena Sdn. Bhd.* v. *Beh Heng Poo.*[1] Service of the notice of motion or summons on all necessary parties will then have to be effected: Order 53 rule 2(3), and there must be at least eight clear days between the service and the day named therein for the hearing: Order 53 rule 2(1).

So far so good; but, there then arises a difficulty because Order 53 rule 2(4) states that an affidavit of service must be filed *before* the motion or summons is entered for hearing.

One does not readily conceive the idea of service of a copy of notice of motion or summons before the original has been filed in the Registry, signed and sealed by the proper officer and assigned a number. Support for this proposition may be derived from the following rules:

Order 8 rule 3(4) provides: "Issue of the notice takes place upon it being sealed by an officer of the Registry".

Order 62 rule 3 provides: "Personal service of a document is effected by leaving a copy of the document with the person to be served and, if so requested by him at the time it is left, showing him – (a) in the case where the document is a writ or other originating process, the sealed copy."

Order 53 rules 2(1) provides, *inter alia*, "... unless the court or a judge granting leave has otherwise directed, there must be 8 clear days between the service of motion or summons and the day named therein for the hearing".

The combined effect of the above rules led me to uphold the submission by counsel for the applicants that since it is impossible to serve a notice of motion before it is filed, it would be equally impossible to file an affidavit of service before the motion is entered for hearing. The point was emphasized and, if I may say so, quite

rightly, that until the notice of motion is filed there is no pending matter or court file in which the affidavit could be filed.

The maxim is *lex non cogit ad impossibilia* (the law does not compel anyone to do impossible things). It is not difficult to cite an anthology of cases in support thereof. My choice is as follows.

In *Rex* v. *Leicestershire Justices,*[2] an Act which provided that an appellant should send notice to the respondent of his having entered into a recognizance, in default of which the appeal should not be allowed, it was held that the death of the respondent was not fatal to the appeal and dispensed with the service.

In *Mayer* v. *Harding,*[3] section 2 of the Summary Jurisdiction Act 1857 made the transmission by the appellant of a case stated by justices to the superior court named in his application within three days of receiving it a condition precedent to the hearing of the appeal. Nevertheless, the requirement was dispensed with on the ground of impossibility because the court was closed during those three days.

In *Harding* v. *Price,*[4] the driver of a trailer was prosecuted under section 22(2) of the Road Traffic Act 1930 for failing to report a collision involving his vehicle and a stationary car. The facts disclosed that because of the noise made by the trailer he was unaware that the collision had occurred. It was held that he was not guilty of the offence. Lord Goddard observed, pithily, "If the duty be to report, he cannot report something of which he has no knowledge... Any other view would lead to calling upon a man to do the impossible."

It is obvious, therefore, that before a notice of motion or summons can be served it must be signed and sealed by a proper officer of the Registry and a date of hearing entered therein.

But, I had to go further and answer the question: when must the affidavit of service be filed?

I would say that since under Order 53 rule 2(4) it is at the second stage, that is to say, on the date of the hearing of the substantive application for certiorari itself, that the judge will require proof by affidavit of the service of copies of the notice or summons, there is, in my view, sufficient compliance with the rule if the affidavit is filed before such date. The affidavit of service is after all formal in nature and the object of the rule will be sufficiently met if it is before the judge before the hearing of the motion or summons. In the present cases, it was not disputed that the affidavits of service were filed before the hearing.

There was, however, at first glance, more substance in the submission that both the content and timing of the affidavit of service necessarily mean that service of the motion or summons must in practice be effected within 14 days after the granting of leave. The following passage, appearing at p. 82 of Mr. Gordon's book on *Judicial Review: Law and Procedure* (1985 Ed.), was quoted in support, the equivalent English rule being Order 53 rule 5(6) which is *in pari materia* with our Order 53 rule 2(4):

> "The content and timing of the affidavit necessarily mean that service of notice of the application must be effected within the fourteen-day period. Failure to do so will prevent an affidavit from being filed and the motion being entered for hearing".

But, reflection reveals that the above passage must be read subject to the consideration that it is based on the English practice where, unlike here, motions are normally heard every weekday (except the last day of each sitting) – see *Practice Direction* [1980] 2 All E.R. 750. It should also be recognized that in England, High Court judges are more numerous than in this country. The applicant is therefore virtually at liberty to stipulate the date of hearing.

Moreover, Order 53 rule 2(1), the material portion of which I have reproduced above, puts paid to this objection by the respondent. This is a specific measure and must therefore override the more general provisions of Order 53 rule 2(4) so far as they may be inconsistent with it.

There was no dispute that the substantive applications in these cases were served more than eight days before the date of hearing named in the notice of motion.

I would add that Order 53 rule 2(4) seems to have the effect of puzzling or perplexing an applicant and consideration should perhaps be given by the Rules Committee to redrafting it, regard being had to local conditions, to achieve greater clarity, accuracy and helpfulness.

If, contrary to my primary opinion, I was wrong in the view I had taken regarding this part of the case, and there had been a breach of Order 53

rule 2(4), then, having regard to the circumstances, especially the fact that the respondent had suffered no prejudice, I condoned the breach by virtue of the powers conferred upon me by Order 2 rule 1(1).

In amplification of this part of the case, I would add a word or two.

First, I did not consider the non-compliance here – if non-compliance there was – to be so fundamental a defect in procedure that I ought not to have exercised my discretion to disregard it. This case clearly illustrated that though the provisions of Order 53 may appear to be comprehensive, their application, having regard to local conditions, including the pressures of over-crowded judicial lists, is not free from doubt or difficulty.

Secondly, I was told by counsel for the applicants, and I took it to be correct, that this was the first time that the Discipline of Staff Rules of any University had come up for interpretation by the Malaysian courts. Consequently, the issues arising upon these applications would most probably be of interest not merely to these applicants but generally to all academics and universities in this country. These issues would relate to the extent of permissible criticism, academic research and comment and defences available to academics facing disciplinary charges. It would be a pity therefore if the determination of such issues was precluded by reason of the application being nipped in the bud, so to speak, for non-compliance with rules of procedure, particularly where, as here, the respondent has suffered no prejudice of any sort.

I would therefore pray in aid the following passage in the judgment of Cumming-Bruce L.J. in *Metro-invest Ansalt* v. *Commercial Union Assurance Co. Ltd.*:[5]

"I would say that in most cases the way in which the court exercises its powers under Order 2 rule 1(2) is likely to depend upon whether it appears that the opposite party has suffered prejudice as a direct consequence of the particular irregularity, that is to say, the particular failure to comply with the rules. But I would construe Order 2 rule 1(2) as being so framed as to give the court the widest power in order to do justice."

In any event, therefore, if it was not open to me to act under Order 2 rule 1(1), then so far as may have been necessary, I had no hesitation in making the necessary orders for extension of time in the exercise of my discretion by virtue of the provisions of Order 3 rule 5(1) and (2) having regard to all the circumstances in order to satisfy the insistent demands for justice.

Most particularly, in exercising my discretion, I took into consideration the fact that there might have been here a mistake on the part of the applicants' solicitor in the interpretation of a complex set of rules which, so far as I am aware, had never been judicially considered in any reported case of our courts, as a result of which, it might be said, that the applicants had fallen foul of the time limits imposed by the rules of court. If so, I did not consider that they ought to suffer for their solicitor's mistakes, regard being had to the particular circumstances of their cases. I considered that such a mistake – if mistake there had been – could and should be a ground for extension of time and I so ordered.

The authority I should like to cite in support of this proposition is the following passage in the judgment of Chang Min Tat F.J. in *Gan Hay Chong* v. *Siow Kian Yuh*:[6]

"He concluded that a mistake by a solicitor was not a sufficient ground for granting an extension of time to file a notice of appeal or a memorandum of appeal. If he had taken the view that the mistake of the appellant's solicitors in the circumstances of this case was not such a ground, his view would, with respect, be unexceptionable *but as a general dictum, it went, to my mind, too far.*"

I therefore dismissed the preliminary objection and directed that the applications be heard on the merits.

The remaining point in these applications may be dealt with shortly.

It was lastly objected that certain exhibits annexed to the affidavits filed in support of the application in the national language were not accompanied by a certified or verified English translation contrary to Order 92 rule 1. It was submitted by counsel for the applicants, and I agreed, that the exhibits were in fact translated in the affidavits concerned so that the omission was immaterial. In any event, it was not suggested that the respondent was in any way prejudiced, so that even if there had been a non-compliance, such as was alleged, I had no hesitation in holding that the omission was one which could be readily condoned under the provisions of Order 2 rule 1(1).

Looking back, I should add, lest I be accused of an oversight, that I had not overlooked the oft

cited dictum of Lord Hodson in *Secretary of State for Defence* v. *Warn,*[7] referred to with approval by Abdoolcader F.J. (as he then was) in *Mersing Omnibus* v. *Minister of Labour,*[8] that "procedural sections are usually mandatory and there is nothing which points to the contrary in this case."

In the *Mersing* case, the High Court had granted leave to commence certiorari proceedings even though the application for leave was made out of time and no extension of time sought or the delay accounted for to its satisfaction. It was held, on appeal, that leave should not have been granted and that the High Court had no jurisdiction to do so. This decision is, of course, wholly in accord with the principle that regulations governing the practice and procedure of civil courts which go to the jurisdiction – and a requirement for leave is such a matter – are in the general interest and cannot be waived (see *e.g. Soho Square Syndicate Ltd.* v. *E. Pollard & Co. Ltd.;*[9] *Bowmaker Ltd.* v. *Tabor*[10]).

In the present case, unlike the *Mersing* case, not only had the applicants obtained leave but had also entered their substantive applications for certiorari within the periods limited under the rules, their only defaults – if defaults there were – being limited to the service of the applications and the filing of the affidavit of service within the periods contended for the respondent. The *Mersing* case was, therefore, clearly distinguishable.

When one considers that the object of the requirements as to service is to put the respondent on notice at the earliest opportunity so that he does not take any further step to the prejudice of either or both parties, the objection loses most, if not all, its sting. I have already pointed out that counsel for the respondent was in fact present when the application for leave was heard before Harun J. and must therefore be assumed to have had notice of the intended substantive application for certiorari and of the grounds therefor. As I have said, there could therefore have been no question of the respondent having suffered any prejudice nor indeed could it even have alleged any.

Moreover, counsel for the applicants had accounted for the delay in effecting service to my satisfaction. It was for these reasons that, assuming, contrary to my primary opinion, service of the applications and filing of the affidavit of service had been effected out of time, so far as may have been necessary, I condoned the defaults and by way of alternative, I made the required orders for extension of time by virtue of the powers conferred upon me by Order 2 rule 1(1) and Order 3 rule 5(1) and (2) respectively.

Finally, I saw no reason why costs of the preliminary objection should not follow the event; that is to say that they had to be paid by the respondent to the applicants, in any event, and I so ordered.

Order accordingly.

Solicitors: *Zain & Co.; Presgrave & Matthews.*

SINJO CREDIT & LEASING SDN. BHD. v. MINISTER OF FINANCE, MALAYSIA

[O.C.J. (Shankar J.) October 11, 1986]

[Johore Bahru – Originating Motion No. 32-16 of 1986]

Administrative Law – Certiorari – Order of – Application for – Forfeiture of car – Appeal to Minister rejected – Discretionary power of Minister – No reasons given – whether decision of Minister ought to be quashed.

The applicant is in the business of selling cars on hire purchase. On May 6, 1985 it entered into a hire purchase agreement with one Nasrul bin Machmuddin with respect to a car No. JBB 2833 ("the car"). On May 13, 1985, acting on information received, some customs officers apprehended this car at Pontian. The driver of the car escaped. When the car was searched, it was found to contain contraband in the form of a substantial quantity of textiles on which duty had not been paid.

On May 7, 1986 an inquiry was held in the Magistrate's Court, Johore Bahru. The customs officers gave evidence. The contraband articles were produced. There was overwhelming evidence that the car had been used in the commission of a customs offence.

The learned magistrate made an order under section 127 of the Customs Act 1967, *i.e.* that the car be forfeited. On May 16, 1986 the applicant appealed to the Minister of Finance for the release of the car to them. It submitted that the hirer had run away, that his whereabouts were unknown and that it would not therefore be possible for the applicant to recover their loss from the hirer. Furthermore, it urged that the court had not found that the applicant was in any way involved in the commission of the offence. The appeal to the Minister was rejected.

The applicant made the present application for leave to apply for an order of certiorari to remove into this court for the purpose of it being quashed, the decision of the Minister of Finance on the appeal made by the applicant.